STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 13, 2014
v	No. 313334 Jackson Circuit Court
SANTEL DELANO DURHAM, Defendant-Appellant.	LC No. 11-004052-FH

Before: OWENS, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of felon in possession of a firearm, MCL 750.224f. He was sentenced as a third-offense habitual offender, MCL 769.11, to 2 to 10 years in prison. We affirm.

I. FACTUAL BACKGROUND

The Jackson County sheriff's office received a tip that marijuana was being sold out of an apartment on Francis Street in Jackson, Michigan. After obtaining a search warrant, the police surrounded the apartment. Officers announced their presence and began entry into the apartment. Two officers near the rear of the apartment saw the basement window open and a black hand extend out of the window. They saw that the man was wearing a black jacket with white stripes around the cuff. The officers then saw the man throw a black semi-automatic handgun into the snow. Consistent with their conversation on a tape recording from a patrol car, the two officers testified that they initially thought the hand that emerged from the window was covered with a football receiver glove.

Another officer made entry into the apartment and saw that defendant was the individual closest to the window. The two officers at the rear of the apartment entered the apartment and observed that defendant was wearing the jacket they observed through the window. Another man present in the basement testified that on the night in question, no one was wearing a coat before the officers entered the basement. He claimed that the officers put their jackets on them, and another man in the basement was wearing gloves. However, he admitted that the coat with the white stripes belonged to defendant.

Defendant was convicted of felon in possession of a firearm, MCL 769.11. Defendant now appeals.

II. JURY SELECTION

A. STANDARD OF REVIEW

Defendant contends that the trial court erred when allowing the prosecution to use a peremptory challenge in violation of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). As discussed *infra*, the United States Supreme Court has established a three-part test for reviewing a *Batson* challenge. "[T]he first *Batson* step is a mixed question of fact and law that is subject to both a clear error (factual) and a de novo (legal) standard of review." *People v Knight*, 473 Mich 324, 342; 701 NW2d 715 (2005). While we review de novo the second *Batson* step, we review the third step—whether the opponent of the peremptory challenge has satisfied the ultimate burden of proving purposeful discrimination—for clear error. *Id.* at 343-345. "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004) (quotation marks and citation omitted).

B. ANALYSIS

"Under the Equal Protection Clause of the Fourteenth Amendment, a party may not exercise a peremptory challenge to remove a prospective juror solely on the basis of the person's race." *Knight*, 473 Mich at 335 (footnote omitted). In *Batson*, the United States Supreme Court established a three-part test to evaluate a claim that a preemptory challenge was based on an improper racial motive. *Id.* First, the opponent of the peremptory challenge must make a prima facie showing of discrimination establishing that: "(1) he is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and (3) all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race." *Knight*, 473 Mich at 336.

The burden then shifts "to the proponent of the peremptory challenge to articulate a race-neutral explanation for the strike." *Id.* at 337. This explanation need not be persuasive or even plausible. *Id.* Rather, the proper inquiry is whether the explanation is facially valid as a matter of law. *Id.* The third step requires the trial court to "determine whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination." *Id.* at 337-338. If the trial court finds that the last two steps weigh in the proponent's favor, then the prima facie showing becomes moot. *Id.* at 338. Moreover, as the United States Supreme Court has recognized, these questions involve issues of credibility and demeanor, which "lie peculiarly within a trial judge's province" and "in the absence of exceptional circumstances," courts should defer to the trial court's determination. *Snyder v Louisiana*, 552 US 472, 477; 128 S Ct 1203; 170 L Ed 2d 175 (2008) (quotation marks and citations omitted).

In the instant case, the prosecutor explained that she used a peremptory challenge because "[the juror] said not only has he seen [defendant] around town several times, he also said that he does speak with defendant around town on certain times. And that decision to peremptory—peremptorily dismiss him is based on his contact with the defendant." Consistent with the

second *Batson* step, this is a race-neutral explanation for the prosecution's action. *Knight*, 473 Mich at 337.

Moreover, regarding the third *Batson* step, defendant has not shown that the trial court clearly erred in finding that the prosecutor's explanation was credible and race-neutral. As the prosecutor explained, the juror in question had met defendant at least seven times and had spoken to him. Thus, rather than a pretext for racial discrimination, the prosecution sought to remove a juror who personally knew defendant. Further, we generally defer to the trial judge's credibility determinations, especially when nothing in the record indicates error. *Snyder*, 552 US at 477. Therefore, whether the first *Batson* step was met has been rendered moot. *Knight*, 473, Mich at 337-338.

Defendant has failed to establish any *Batson* violation or that reversal is required.

III. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Defendant next asserts that there was insufficient evidence to convict him of felon in possession of a firearm. "Due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact to conclude that the defendant is guilty beyond a reasonable doubt." *People v Tombs*, 260 Mich App 201, 206-207; 679 NW2d 77 (2003). We review "de novo a challenge on appeal to the sufficiency of the evidence." *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor" to ascertain "whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (internal quotations and citations omitted). "All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008).

B. ANALYSIS

Defendant contends that there was insufficient evidence that he was the man who threw the gun out the window. See *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008) (identity is an element of every crime). Viewing the evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence that defendant possessed the handgun.

Two police officers testified that a black male's hand emerged from a basement window and threw a handgun into the snow. The officers testified that the arm was covered with a black coat with white stripes. The same officers then entered the basement and observed defendant wearing the black coat with white stripes. Moreover, other officers entered the basement seconds after the handgun was thrown and saw that defendant was the closest individual to a window. The defense witness confirmed that defendant had a black coat with white stripes on the night in question.

Defendant, however, posits that the police officers initially identified a gloved hand, and only changed their story in order to implicate defendant. Yet, this argument merely asks us to second-guess the jury's determinations of credibility and weight, which we will not do. *Unger*, 278 Mich App at 222.

We conclude that there was sufficient evidence supporting defendant's conviction.

IV. MOTION FOR MISTRIAL

A. STANDARD OF REVIEW

Defendant next contends that the trial court erred in denying his motion for a mistrial based on the prosecutor's failure to disclose the existence of a supplemental police report.[1] "We review for an abuse of discretion a trial court's decision regarding a motion for a mistrial." *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). The trial court should grant a mistrial only if there is an irregularity that is prejudicial to the rights of defendant and impaired defendant's ability to receive a fair trial. *Id.*

B. ANALYSIS

Through the questioning of a police officer at trial, it was revealed that there was a supplemental police report that defendant had not received before trial despite numerous discovery requests. On appeal, defendant claims that a mistrial should have been granted, citing to MCL 6.201(B), which provides:

> (B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:
>
> > (1) any exculpatory information or evidence known to the prosecuting attorney;
> >
> > (2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation[.]

Even assuming, *arguendo*, that the prosecutor committed error under the court rule when failing to disclose the supplemental report, reversal is not required. MCR 6.201(J) states: "If a party fails to comply with [MCR 6.201], the court, in its discretion, may order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances." As we have recognized, "'[w]hen determining the appropriate remedy for discovery violations, the trial court must balance the

[1] Defendant characterizes this issue as a failure to comply with the discovery rules. He raises no challenge or analysis based on *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance.'" *People v Greenfield*, 271 Mich App 442, 456 n 10; 722 NW2d 254 (2006), quoting *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002); see also *People v Jackson*, 292 Mich App 583, 591; 808 NW2d 541 (2011).

In the instant case, the trial court fashioned an appropriate remedy to avoid prejudice to defendant. The court granted a continuance, which afforded defendant the opportunity to explore the value of the evidence and "alleviated any harm to defendant's case by allowing both parties to prepare for the evidence[.]" *People v Elston*, 462 Mich 751, 764; 614 NW2d 595 (2000). Defendant has failed to explain why a continuance was inadequate, or how there remained outcome-determinative error.

After examining the evidence, defendant made the strategic decision not to present any evidence related to the police report. Nor did the prosecution present evidence derived from the report. Thus, the cases defendant cites are inapposite, as no evidence from this document was introduced at trial. Although defendant now argues that his counsel would have altered her opening statement, the purpose of an opening statement is to outline the evidence to be presented at trial. MCR 2.507(A); see also *U S v Dinitz*, 424 US 600, 612; 96 S Ct 1075; 47 L Ed 2d 267 (1976) (BURGER, CJ., concurring) ("An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument.").

Therefore, defendant has failed to establish that the trial court erred in denying his request for a mistrial.

V. JURY INSTRUCTION

Lastly, defendant posits that there was instructional error requiring reversal. At trial, defendant requested the jury to be instructed that the witnesses from the supplemental police report would have testified in his favor.[2] On appeal, however, defendant argues that a slightly different instruction should have been given, namely, that the officers' failure to interview witnesses from the supplemental police report constituted exculpatory evidence of an incomplete investigation. While such an instruction is certainly favorable to the defense, defendant has provided no legal basis for why it was warranted. Police officers are not required to conduct an investigation on defendant's behalf. *People v Burwick*, 450 Mich 281, 289 n 10; 537 NW2d 813 (1995). Further, exculpatory evidence is that which tends to prove defendant's innocence, *Black's Law Dictionary* (9th ed), and defendant has provided no authority for the proposition that the failure to pursue every lead is tantamount to exculpatory evidence. See *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009) (quotation marks and citation omitted) ("An appellant may not merely announce his position and leave it to this Court to discover and

[2] This is tantamount to the missing witness instruction, CJI 2d 5.12, which reads: The witness "is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case."

rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.").

Thus, defendant has not established that reversal is warranted.

VI. CONCLUSION

Defendant has not established that the prosecution violated *Batson* during jury selection or that he was convicted based on insufficient evidence. Further, defendant has not established that a mistrial was warranted, or that there was instructional error warranting reversal. We affirm.

/s/ Donald S. Owens
/s/ Christopher M. Murray
/s/ Michael J. Riordan